



Brenner, Saltzman & Wallman LLP

Attorneys at Law – Established 1963

January 17, 2018

***Via Email: zgriegen@clf.org
And Federal Express***

Zachary K. Griefen, Esq.
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Conservation Law Foundation
15 East Street, Suite 4
Montpelier, VT 05602.

RECEIVED
JAN 22 2018
OFFICE OF THE REGIONAL ADMINISTRATOR

Re: Notice of Alleged Violations and Intent to File Suit under the Clean Water Act—Milford Wharf Company, d/b/a Port Milford, 164 Rogers Avenue, Milford, Connecticut

Dear Attorney Griefen:

Milford Wharf Company, d/b/a Port Milford ("Port Milford") writes to respond to the Notice of Violations and Intent to File Suit under the Clean Water Act ("CWA"), dated November 20, 2017, forwarded by the Conservation Law Foundation ("CLF"). The attached documentation demonstrates that Port Milford has not violated the CWA, as it has not, does not currently, nor is there any evidence which raises a question that it will violate the CWA, because it does not discharge any pollutants from any "point source" as defined by the CWA. Absent a discharge of pollutant from a "point source," CLF cannot establish any of the violations of the CWA alleged in CLF's Notice. While Port Milford maintains that the attached materials clearly establish no point source discharges, it would welcome an in-person visit by you or any other CLF representative to show you that no point sources discharges appear anywhere at 164 Rogers Avenue. Because Port Milford has no point source discharges, no basis exists for CLF to file and maintain a suit under Section 5 of the CWA. Port Milford therefore requests that CLF confirm that it is withdrawing its Notice of Violations and Intent to File, dated November 20, 2017.

Applicable Law. The Second Circuit has multiple decisions which discuss and define "point source" under the CWA. In Simsbury-Avon Preservation Society, LLC et al. v. Metacon Gun Club, Inc., 575 F.3d 199 (2009), the Second Circuit focused on what constitutes a "point source." It rejected the plaintiff's proposal that an earth berm, which contained lead casings, qualified as a point source under the CWA. It pointed out that the phrase, "'discernible, confined and discrete conveyance' cannot be interpreted so broadly as to read the point source requirement out of the statute." *Id.* at p. 219. It went on to differentiate non-point source pollution which is not regulated under the CWA from point



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source pollution which is regulated. Id. at 220. Where no discharge occurs from a specific, single location, no point source exists. Id. Where the pollution is neither collected nor channeled, the runoff is not subject to a CWA permit requirement. Id. at 221. The Second Circuit then opined that, "Limiting the scope of the term point source to surface runoff that is collected or channeled by human beings is consistent with the CWA's definition of point sources as discernible, confined and discrete conveyances, such as 'any pipe, ditch, channel, tunnel, conduit, well, discrete fissure [or] container...'" Id. at 221 (citations omitted). It specifically rejected the idea that a point source included, "unchanneled and uncollected surface waters." Id. The Second Department remarked, emphatically, "To find that [plaintiff] has presented sufficient evidence that the berm constitutes a point source...would imply that runoff or windblown pollutants from any identifiable source, whether channeled or not, are subject to the CWA permit requirement. Such a construction would eviscerate the point source requirement and undo Congress's choice." Id. at 224.

The Connecticut District Court explored the definition of "point source" more recently in 26 Crown Associates, LLC v. Greater New Haven Regional Water Pollution Control Authority, 2017 WL 2960506 (J. Meyer)(on appeal). Judge Meyer therein ruled that, "allegations of the pollution of navigable waters by means of passive ground water migration do not suffice as a matter of law to state a claim under the Clean Water Act." Id. at *1. The CWA requires that the pollution alleged result from a "point source"—"that is, a discrete conveyance channel that is used to directly pollute navigable waters." Id. at 7. Judge Meyer noted that, "It is basic science that ground water is widely diffused by saturation within the crevices of underground rocks and soil...[A] diffuse medium like ground water for the passive migration of pollutants to navigable waters cannot constitute a point source within the meaning of the Clean Water Act." Id. at *8. Judge Meyer then dismissed the plaintiff's claims under the Clean Water Act. Id. at *9.

CLF Allegations. On page 2 of its Notice letter, CLF states that, "Stormwater discharges flow from [Port Milford] on to sloped surfaces, ramps, drainage paths, and ditches and then into Milford Harbor." On page 5, CLF asserts that, "polluted runoff is then conveyed off-site into waters of the United States via man-made collection systems, sloped surfaces and site grading, shallow hydrological connections, and through the operation of gravity." On page 6, CLF further identifies as potential point sources: travel lifts, marine railways and ramp systems, catch basins and drains, boats, machines and equipment left and stored outside, fueling stations, vehicles driving on and off the Facility and other conveyances to Milford Harbor and other waters of the United States. CLF maintains that Port Milford must submit a registration form which describes, "conveyance, outfalls or channelized flows that run off the site...amount of impervious surfaces..." CLF Notice Letter, p. 7.



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Site Characteristics. While I assume that CLF has access to and has already reviewed publically available satellite photographs, I attach as Exhibit 1 Google Maps satellite photographs of Port Milford at 164 Rogers Avenue in Milford. Exhibit 2 is a site survey. Exhibit 3 includes numerous photographs of the site, taken on Monday January 15, 2018, which explore the perimeter and interior of the Site to demonstrate key features, along with a description of the photographs, including the location taken. These photographs depict Port Milford just after 11.6 inches of snow which fell on January 4, 2018 melted in unseasonably warm weather on 1/12-13, 2018, along with rainfall totaling just over 2 inches, followed by a rapid freeze which hardened into place any site conditions, including channels or fissures at Port Milford which could have delivered this substantial rainfall and snowmelt to Milford Harbor. Reports which record these weather events appear as Exhibit 4.

In addition to showing clearly the absence of any "point sources", the photographs reflect the absence of many typical features of a boatyard which CLF guessed would be present to serve as point sources. Port Milford has no "boat ramp" (Exhibit 3, pp. 4-9), no "impervious surfaces" (*Id.*, pp. 4-9, 14, 19, 21-28), no drainage paths (*Id.*). All "ramps" have open spaces between the boards, so that water would not and could not travel down them. *Id.*, pp. 4-8. Marshland surrounds the boat yard on the west and displays no channels directing water from the gravel surfaces to the water. *Id.*, pp. 1, 2, 9-14, 16-20. The areas where automobiles, other vehicles and boats sit are dirt with gravel, no impervious areas. *Id.*, pp. 14, 16, 19, 22-28. The property is flat from the entrance on Rogers Avenue to the water's edge on the north, which is marked abruptly by a steel retaining wall which extends above the dirt and gravel surface and drops vertically into the harbor. *Id.*, pp. 5-8. Even the floor under the covered work building is dirt and gravel, not impervious slab. *Id.*, p.24.

CLF may have detected two concrete drainage pipes, one at the northeastern corner of the property at the water's edge (*Id.*, pp. 1-2), the other mid-way along the western border, abutting the marsh (*Id.*, pp. 15, 16, 19). Neither pipe relates to any operations of Port Milford or carries any water from Port Milford to Milford Harbor. The pipe on the east side is off the Port Milford property, running from a storm drain on Rogers Avenue, under the neighboring property which is owned by the U.S. government. *Id.*, pp. 1-2, 26-27; Survey, Exhibit 2. The survey, Exhibit 2, shows the other pipe which ends at the western border into the marsh. The signed, sealed survey notes that this pipe was previously operated, then abandoned by the Town of Milford. *Id.* No other pipes, channels or conveyances appear along any other borders of Port Milford. Exh. 2; Exhibit 3, pp. 1-20, 26-27.



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Port Milford has no permanent structure where it conducts boat washing and channels any waters from those efforts to any place off-site. Instead, when it washes boats, it constructs a temporary containment pool, captures all water, stores it in containers (Exh. 3, pp. 28-29) and then ships it off site. This method meets the requirements of Connecticut's Clean Marina practices for boat washing. Connecticut Clean Marina Guidebook, pp. 52-53, attached as Exhibit 5. As CLF is likely aware, given that it has embarked on pursuing a number of Connecticut marinas, the Clean Marina Program is voluntary, not a required program in which Port Milford must participate. See, Exhibit 6, CTDEEP Website page for Clean Marina Program.

Port Milford is proud to be led and guided by Captain Keith Knowlton, a licensed, certified marina manager with fifteen years of experience, who has led four marinas through the process to be certified as a "Clean Marina". Port Milford has pursued appropriate permits with Milford's Planning and Zoning Commission, CTDEEP and the Army Corp of Engineers for its dredging operations (11/8/17), re-design of the marina perimeter (July 10, 2017) and bulkhead work (October 20, 2016).

But the real evidence is the photographs (Exhibit 3), which capture frozen site conditions after intense melting and heavy rains (Exhibit 4). No point sources anywhere. Exh. 3. Absent a point source, the CWA does not regulate discharges, if any occur. S.A.P., 575 F.3d at 220-221. Potential releases to the ground, which happen to seep into the ground water, do not qualify as point sources. 26 Crown Associates, 2017 WL 2960506, * 8. In this well-documented instance, where the CWA does not require any permits, CLF lacks a basis for maintaining a suit alleging violations by Port Milford for not securing stormwater permits. As discussed with you on Friday, January 12, 2018, the District Court may not look kindly on use of its resources to pursue a claim under the CWA which so clearly lacks merit.



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I look forward to discussing this evidence with you. Please, let me know if you would like to visit Port Milford, to confirm that the photographs do fairly and accurately reflect site conditions. Again, Port Milford asks CLF to send notification that it is withdrawing its Notice of Violations and Intent to File Suit, dated 11/20/18.

Very truly yours,

A handwritten signature in black ink, appearing to read "Holly Winger".

Holly Winger

PCS: HW

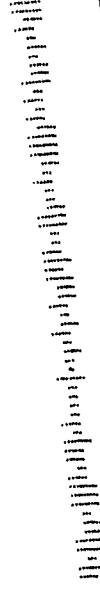
Cc: Kevin Coady, Keith Knowlton, Port Milford, via email (with enclosures)
Scott Pruitt, Administrator, EPA; Deborah Szaro, Acting Regional Administrator, EPA
Region 1; Robert Klee, Commissioner, CTDEEP (via USPS, w/o enclosures)



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